LEE HAY

v.

YANG DI PERTUA MAJLIS DAERAH HULU LANGAT & ANOR

HIGH COURT MALAYA, SHAH ALAM
FAIZA TAMBY CHIK J
[SUIT NO: 22-81-93]
25 FEBRUARY 1998

ADMINISTRATIVE LAW: *Judicial review - Local authority - Exercise of administrative power - Whether Local authority took into account irrelevant consideration - Whether did not take into account relevant consideration - Whether guilty of unfair discrimination - Whether decisions unreasonable, ultra vires and unconstitutional - Local Government Act 1976 s. 107 - Federal Constitution arts. 5(1), 8(1)*

ADMINISTRATIVE LAW: *Judicial review - Local authority - Exercise of administrative power - Legitimate expectation - Concept of - Whether referred to procedural fairness - Whether plaintiff had legitimate expectation that the public body will act fairly towards her*

The plaintiff had been trading as a newspaper vendor at the Old Market, Kajang under a licence issued by the defendants. In 1991 the defendants sought to relocate the traders at the Old Market to the New Market and, following a balloting exercise, allocated Lot GBR38, which was on the First Floor of the New Market, to the plaintiff. The plaintiff was dissatisfied with Lot GBR38 and appealed to the second defendant, the Majlis Daerah Ulu Langat, for a different stall. Following the appeal, the President of the second defendant ('Ali Shafie') allocated stall Lot GS39, which was on the Ground Floor of the New Market, to the plaintiff. Ali Shafie's decision was endorsed by the Full Council of the second defendant, and based on the approval, the plaintiff proceeded to renovate and occupy Lot GS39.

Following Ali Shafie's death in 1992, however, the defendants took the stand that the plaintiff's business at Lot GS39 contravened their policy of using the Ground Floor for a Wet Market, and they therefore revoked Ali Shafie's decision aforesaid and asked the plaintiff to move back to Lot GBR38. The plaintiff alleged that the decision to evict her out of Lot GS39 was unreasonable and was actuated by *mala fide*, and consequently sued the defendants for the restoration to her of that stall. The facts also showed that the defendants, whilst barring the plaintiff from trading on the Ground Floor by virtue of its Wet Market Policy, had nevertheless allowed on the said floor various businesses

which were not suitable for a Wet Market. That being the case, the plaintiff argued that the defendants' discriminatory actions against her had also contravened art. 8 of the Federal Constitution.

Held:

[1] The defendants, having made a decision in the Full Council meeting allowing the plaintiff to change from Lot GBR38 to Lot GS39, could not alter such decision to the plaintiff's disadvantage except for good and valid reasons. The evidence showed that the second defendant had altered the decision without good and valid reasons. Also, bearing in mind s. 115 of the Evidence Act 1950, and the principle of equitable estoppel, the defendants are estopped from denying the plaintiff's right to occupy Lot GS39.

[2] It would appear from the facts that there was in fact no such policy stating that the Ground Floor of the market was to be used only for wet goods. In any case, the second defendant's conduct shows that it has abandoned its Wet Market Policy if ever there was such a policy. This being the case, the reason given by the defendants for taking action against the plaintiff was an irrelevant consideration. Likewise, the defendants also took into account an irrelevant consideration when it asked the plaintiff to move from Lot GS39 on the further ground that she was a bare licensee. The plaintiff is clearly not a 'bare licensee'.

[3] The defendants' actions are unreasonable and unconscionable because they have singled out the plaintiff for action although there are many stall-owners whose positions are similar to hers and the defendants have not taken action against them. Indeed, the defendants' actions have contravened art. 8 of the Federal Constitution since, in their purported exercise of discretion under the 'Undang-Undang Kecil Penjaja (Kawasan Majlis Daerah Ulu Langat) 1983', they had unfairly discriminated the plaintiff and deprived her of her right to equal protection under the law. On the facts, the plaintiff had clearly been given unequal treatment under the law.

[4] The defendants had committed an error of law in that they had arrived at a decision which no reasonable tribunal could have reached. Also, since the second defendant took into account irrelevant considerations and acted in bad faith, it must follow that it had acted *ultra vires* its powers under the Local Government Act 1976. These apart, the change in decision had also showed dishonest misuse of power or mala fide on the part of the second defendant.

[5] The defendants had exercised their discretionary powers under an error of law since there was no evidence to support their action. And, as the decision requiring the plaintiff to move from Lot GS39 to Lot GBR38 is not justified in law, the court should interfere and restore the plaintiff to Lot GS39. It ought also to be noted that the plaintiff, having been given Lot GS39 by the late Ali Shafie, which decision was subsequently ratified by the second defendant in a Full Council meeting, had a legitimate expectation that the decision of the second defendant would not be reversed without good and valid reasons.

[6] The defendants' decision was an administrative one and by virtue of s. 107 of the Local Government Act 1976 they need not give reasons for such decision. However the second defendant had given its reasons and the reasons were so unreasonable that it showed that the decision was wrongly made. In such circumstance, the court can have a judicial review and ask the second defendant to reconsider the decision to move the plaintiff from Lot GS 39, in effect to ask the second defendant to reinstate Ali Shafie's allocation of Lot GS 39 to the plaintiff.

[Order in terms of plaintiff's application.]

Case(s) referred to:

Ahmad Tajudin Hj Ishak v. Suruhanjaya Pelabuhan Pulau Pinang [1997] 2 CLJ 225 ***(refd)***

Ashbridge Investment v. Minister of Housing [1965] 3 All ER 371 ***(refd)***

Associated Provincial Picture Houses Ltd v. Wednesbury Corp [1947] 2 All ER 680 ***(refd)***

Coleen Properties v. Minister of Housing [1971] 1 All ER 1049 ***(refd)***

Council of Civil Service Unions v. Minister for Civil Service [1984] 3 All ER 935 ***(foll)***

Datuk Hj Harun Hj Idris v. PP [1977] 2 MLJ 155 ***(refd)***

Edwards (Inspector of Taxes) v. Bairstow [1955] 3 All ER 48 ***(refd)***

Municipal Council of Sydney v. Campbell [1925] AC 338 ***(refd)***

Penang Development Corpn v. Teoh Eng Huat [1993] 2 CLJ 283 ***(refd)***

Pengarah Tanah Dan Galian Wilayah Persekutuan Sri Lembah Enerrise Sdn Bhd [1979] 1 MLJ 135 ***(refd)***

Plessy v. Ferguson [1896] 163 US 537 ***(refd)***

Pushpadevi Singam v. University of Malaya [1993] 4 CLJ 602 ***(foll)***

PP v. Khong Teng Khen [1976] 2 MLJ 166 ***(refd)***

PP v. Mansor [1997] 1 CLJ 233 ***(refd)***

Re 56 Denton Road Twickenham [1953] Ch ***(refd)***

Teo Hock Guan v. Johore Builders [1996] 4 CLJ 184 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 115
Federal Constitution, arts. 5(1), 8, (1)
Housing Act 1957, s. 43(2)
Housing Developers (Control & Licensing) Act 1966, s. 2(1)(b)
Local Government Act 1976, ss. 27, 107

Other source(s) referred to:
Administrative Law of Malaysia & Singapore, MP Jain, 1980, p 300
Constitutional and Administrative Law, Wade & Bradley, 10th edn, pp 632, 633
Judicial Review: Law & Procedure, RJF Gordon, 1985, p 138
Land Law in Malaysia, Teo & Khaw, 1987, p 175
The Constitution of Malaysia, Sheridan & Groves, 1979, p 61
The Law of Real Property, RE Megarry, 3rd edn, pp 776-77
Wade on Administrative Law, 6th edn, p 43

For the plaintiff - Chew Swee Yoke; M/s SY Chew & Co
For the defendants - Markiman; M/s Markiman & Assoc

Reported by WA Sharif

JUDGMENT

Faiza Tamby Chik J:

The plaintiff sued the defendants because the 2nd defendant revoked an earlier decision to allocate a stall Lot GS39 to her and did so because of grounds which were unreasonable and because they had taken into account irrelevant consideration and therefore had committed an error of law. Further, the plaintiff sued because the defendants' discriminatory action against her amounted to a contravention of art. 8 of the Federal Constitution (See the amended statement of claim dated 26 May 1993.)

The defence is, *inter alia*, that the plaintiff is a bare licensee, that she moved to Lot GS39 without permission, that there was no full council decision to allocate the said stall to the plaintiff, that she was required to move from Lot GS39 because her nature of business, selling newspapers, contradicted the "wet market" policy was not suitable for Lot GS39 which was meant for selling vegetables and that under the law, the 2nd defendant, a local authority, could revoke the plaintiffs bare licence without giving any reason.

Facts

The plaintiff (SP1) had been a stall owner selling newspapers in the Kajang Old Market since 1982 until the cause of action arose in late 1992. There were renewals of her trading licence No. 0524 from 1982 till March 1991 (See exh. P1). The trades were told to move to the new market. Exhibit P3 is a letter

of 18 November 1991 from the 2nd defendant to the plaintiff telling her to attend a balloting of stalls in the new market on 21 November 1991. She did attend and was originally allotted Lot GBR 38 on the 1st Floor and being dissatisfied with it, she wrote a letter of appeal dated 23 November 1991 to the 2nd defendant (See exh. P2). On 20 March 1992, Haji Ali Shafie (district officer and president of the 2nd defendant) agreed to give her Lot GS39 on the ground floor and wrote a note confirming this on exh. P3. This was subsequently formally agreed by a full council meeting of the 2nd defendant on 27 April 1992 (See exh. P5(8) which shows item 6.2 at p. 15 of 'A') Based on the approval, the plaintiff proceeded to expend money on renovations to the stall which cost RM5,500, the items of which are stated on exh. P2 which is in hand written notes of SP6, a councillor, Dr. Zainal Abidin. The total sum is erroneously stated as RM4,500 when it should be RM5,500 based on the items stated therein.

According to the evidence of SP2 (Lee Ah Yoke) under examination-in-chief on 10 October 1995, Haji Ali Shafie died in June 1992. Evidence of SP3 (Tan Yew Kong), a councillor when recalled under examination-in-chief on 25 September 1996 shows that soon after Haji Ali died, his decision as confirmed by the full council meeting of 27 April 1992 had been reversed. SP3 said this was the first time a district officer died and his decision was changed.

The 1st defendant sent a letter of 3 November 1992 to the plaintiff (exh. P6) telling her that a full council meeting of the 2nd defendant had decided that she should move back to Lot GBR38 from Lot GS39, on failure of which the 2nd defendant would take further action. In her reply letter of 17 November 1992 (exh. P7) the plaintiff asked the 1st defendant for the reason for the reversal of the earlier decision and appealed against it. The 1st defendant wrote a letter of 10 December 1992 to the plaintiff (exh. P8) rejecting her appeal and referring to a full council meeting of 26 November 1992 (See exh. D20) which has made the decision to reject her appeal.

When the plaintiff did not move to Lot GBR 38, the 2nd defendant sent a letter of 14 January 1993 giving her 7 days to move out (See (exh. P9). There was an exchange of letters between the plaintiff's solicitors and the defendants' solicitors (exh. P10 and exh. 11). Electricity bills exh. P12 show that the plaintiff had occupied Lot GS39 since July 1992; see particularly P12(1). It is probable that sometime between March 1992 (date when Haji Ali bin Shafie agreed to allocate GS39 to her: see P3), and October 1992, the plaintiff was already occupying Lot GS39 and after that officers of the 2nd defendant used to harrass her saying she was occupying someone else's stall.

The plaintiff filed her action herein on 13 February 1993, and applied twice for an injunction. After the first application failed, the plaintiff discharged her previous solicitors and engaged her present solicitors who amended the statement of claim. In the injunction proceedings affidavits of the defendants revealed certain facts which support the plaintiffs allegation that the 2nd defendant had exercised its discretionary powers under the Local Government Act in bad faith. The plaintiff gave the particulars of bad faith in para. 19 of her amended statement of claim that is;

(a) The reason given by the 2nd defendant for requiring the plaintiff to move from the said Lot GS39 to the said Lot GBR 38 is that the said Lot GS39 is located on the ground floor that has been designated as a wet market and the nature of the plaintiff's business was not suitable for the character of a wet market. This is confirmed by the evidence of SP4 (Ang Boo Soh) a councillor on 10 October 1995 and SP3 (Shoib bin Hj. Md. Silin) a councillor on 29 October 1997. SP4 said on 10 October 1995 that the reason given by the licensing committee was that GS39 was meant for green, fresh vegetables. In fact it is clear from the evidence of both parties' witnesses that "GS" stand for "gerai sayur". This fact is also supported by p. 134-136 of the "ikatan pliding untuk injunksi" or sheets 9-11 of exh. MDHL.2 of the affidavit of Abdullah bin Hj. Rahman dated 31 December 1993

(b) The defendants have allowed on the ground floor various businesses which cannot be said to be suitable for the character of a wet market but the owners of the said businesses have not been ordered to move to the upper floor. This is confirmed by the evidence of SP2 on 10 October 1995 and 8 August 1996 and the evidence of another stall-owner DP7 (Abdul Lajis @ Abdul Aziz bin Lani) on 25 September 1996. Evidence of SP5 (Chong) on 8 August 1996 and evidence of SP3 (recalled on 8 August 1996) and even the evidence of the defence witness SD2 on 25 September 1996 confirmed there were stalls selling goods which they should not on the ground floor. Several of the witnesses gave evidence while viewing the video tape (P21) made of the stalls on the ground floor which was made by SP5 on 20 October 1993. Both SP2 and SP7 confirmed that the stalls shown on P21 had been in the new market since it opened and were still there. SP7 said he had a licence from 1984 till 1991 as shown on exh. P4. Exhibit P27 shows his licence which was renewed in 1994. He said no action was taken against anyone else except the plaintiff. He also referred to the only public toilet downstairs being use for storage of goods and being locked, an indication that the defendants did not strictly follow the law in its administration of the market.

(c) The defendants had stated that the plaintiff was not a tenant because she had not paid the rental money to the 2nd defendant for the said Lot GS39

(d) Until the time the plaintiff filed her claim in court, the 2nd defendant had not fixed the rental necessary to be paid by anyone whatsoever in the said new market and the other owners of businesses who had not paid any rental money are still treated as legal tenants by the defendants.

In the evidence of SP1 on 10 October 1995, evidence of SP2 on 10 October 1995 and on 8 August 1996 when recalled and of SP7 on 25 September 1996, it had been proved that everyone else in the new market was waiting for a licence and had not paid rental and the only person given notice to quit was the plaintiff.

(e) The deceased former president of the 2nd defendant Haji Ali Shafie decided on 20 March 1992 that the said Lot GS39 be given to the plaintiff in place of the said Lot GBR38 and this decision was legalised by a full council meeting of the 2nd defendant on 27 April 1992.

(f) "The decision of the late Haji Ali bin Shafie is evidenced in exh. P3 and the decision of the full council meeting of the 2nd defendant dated 27 April 1992 is evidenced in item 6.2 of the minutes of the meeting shown in exh. 5(8). It will be observed that the late Haji Ali Shafie (DO) would not have allocated GS39 to the plaintiff if indeed there was such a wet market concept.

(g) The deceased former president died in June 1992 and about five months after that the 2nd defendant cancelled the said decision regarding the said Lot GS9 without good, reasonable and valid reasons. This has been proved by the evidence of SP2 on 10 October 1995. Exhibit P6 and the evidence of SP3 who said that this was the first time when a D.O. died and his decision was changed and that this (plaintiff's case) is the only case where the stall-owner is moved. SP3 was a member of the licensing committee at the relevant time:

He confirmed this in his evidence under examination-in-chief on 25 September 1996.

The defence had not called the council secretary or the president to give evidence. Of the 2 enforcement officers called to give evidence on 25 September 1996 for the defence, SP1 was not a helpful witness as he admitted he was not involved with control or enforcement over the inside of the new market and that he did not come under the jurisdiction of the licensing committee (the relevant committee dealing with licences). SP2 admitted that he did not know of the situation before 1993, but he confirmed that currently there

were stalls selling goods they were not supposed to, such as another stall apart from the plaintiff's stall selling newspaper downstairs when it should be selling eggs. SP3 (Shoib bin Hj. Md. Silin) a councillor and chairman of the licensing committee, giving evidence on 29 October 1997 alleged that the plaintiff was the only one who had changed her stall from the one originally allotted to her. However this contradicted the evidence in an affidavit dated 19 September 1993 affirmed by the council secretary Abdullah bin Hj. Rahman (encl. 33) at para. 11(ii) which stated that another stall-owner, Lee Chuan Hay, was according to the minutes of the licensing committee dated 16 March 1992 given Lot GS39 as he had requested for a change of his original lot. Under cross-examination, when asked if it was possible that the licensing committee had forgotten about the decision of the full council on 27 April 1992 (exh. P5), he said he did not know about the statement in encl. 33. It is noted that the affidavit was made by a person authorised by the council and he must have read the minutes of the licensing committee before he made the affidavit.

In encl. 33 at para. 10(b) it was stated that the council secretary was unable to produce the minutes of the full council meeting of 27 April 1992 as there appeared to be no record of such a meeting having taken place on the said date. This situation was also borne out by what happened in a meeting of 5 October 1994 between the plaintiff and her solicitor and the defendant's representatives referred to in exh. P19. The situation in the 2nd defendant's office had prompted investigation by the Anti-Corruption Agency (ACA) and the last sentence of para. 4 of P19 suggests to the defendants' solicitors to check with ACA for a copy of the minutes of 27 April 1992. Defence counsel himself had mentioned the ACA investigation in court when he explained his late application to include new documents. SP3 (Tan Yew Kong) when recalled on 25 September 1996 said in examination-in-chief that he was aware of the ACA investigation and that he had read in the newspapers of the ACA police looking for the council secretary, Mohd Khashim bin Abdul Sakor whose name appeared at the bottom of the 2nd defendant's letter (exh. P3).

When asked about GS44 which appeared to be selling lots of sundry good and not vegetables which was what the stall was for (see exh. P13(5) he said it must be one of those stalls which had not signed contracts vet with the council. In the circumstances it could questioned why is the plaintiff being singled out for action against her. This illustrated the bad faith of the defendants.

The Law

The defendants' actions are unreasonable and unconscionable because they have singled out the plaintiff for action although there are many stall-owners whose positions are similar to hers and the defendants have not taken action against them: (See para. 19(1) of the amended statement of claim.)

In *Associated Provincial Pictures Houses v. Wednesbury Crop* [1947] 2 All ER 680 it was held that the court is entitled to investigate a local authority's action with a view to seeing whether it has taken into account matters which it ought not to take into account or has refused to take into account matters which it ought to take into account. Once the court decides in favour of the local authority on these questions, it is still open to the court to decide if the local authority has come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In coming to such a conclusion, the court is not overriding the local authority's decision but acts as a judicial authority concerned only to see whether the local authority has contravened the law by acting in excess of the powers given to it by Parliament. Lord Greene, MR in his judgement in that case stated at p. 682:

> The contention of the authority, in my opinion, is based on a misconception of the effect of the Act in granting this discretionary power to local authorities. The courts must always remember, first, that the Act deals, not with a judicial act but with an executive act; secondly, that the conditions which, under the exercise of that executive act, may be imposed are in terms put within the discretion of the local authority without limitation; and thirdly, that the statute provides no appeal from the decision of the local authority. What, then, is the power of the courts? The courts can only interfere with an act of an executive authority if it be shown that the authority have contravened the law. It is for those who assert that the local authority have contravened the law to establish that proposition. On the face of it, a condition of this kind is perfectly lawful. It is not to be assumed *prima facie* that responsible bodies like local authorities will exceed their powers, and the court, whenever it is alleged that the local authority have contravened the law must not substitute itself for the local authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of that discretion can only be challenged in the courts in a very limited class of case. It must always be remembered that the court is not a court of appeal. The law recognises certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law.
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> What, then, are those principles? They are perfectly well understood. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question they must disregard those matters. Expressions have been used in case where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty - those, of course, stand by themselves -

> unreasonableness, attention given to extraneous circumstance, disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration. In the present case we have heard a great deal about the meaning of the word "unreasonable". It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration maters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington, LJ. I think it was, gave the example of the red-hair teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact all these things largely fall under one head.

At p. 685 he summarised the principle:

> I do not wish to repeat what I have said, but it might be useful to summarise once again the principle, which seems to me to be that the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless, have come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in it.

In the case of *Council of Civil Service Unions v. Minister for Civil Service* [1984] 3 All ER 935 it is stated that an aggrieved person was entitled to invoke judicial review if he showed that a decision of a public authority affected him by depriving him of some benefit or advantage which in the past he had been permitted to enjoy and which he could legitimately expect to be permitted to continue to enjoy either until he was given reasons for its withdrawal and the opportunity to comment on those reasons or because he had received an assurance that it would not be withdrawn before he had been given the opportunity of making representations against the withdrawal. In that case it was held:

That an aggrieved person was entitled to invoke judicial review if he showed that a decision of a public authority affected him by depriving him of some benefit or advantage which in the past he had been permitted to enjoy and which he could legitimately expect to be permitted to continue to enjoy either until he was given reasons for its withdrawal and the opportunity to comment on those reasons or because he had received an assurance that it would not be withdrawn before he had been given the opportunity of making representation against the withdrawal.

Lord Scarman, Lord Diplock and Lord Roskill at p. 937 of the case also said that administrative action is subject to control by judicial review under three heads: (1) Illegality where the decision-making authority has been guilty of an error of law eg, by purporting to exercise a power it does not possess (2) irrationality where the decision-making authority has acted so unreasonably that a reasonable authority would not have made the decision; (3) procedural impropriety where the decision-making authority has failed in its duty to act fairly.

Lord Diplock talked of a "legitimate expectation" of contravention of some benefit or advantage allowed in the past. He said:

"judicial review, now regulated by RSC O. 53, provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the 'decision-makers' or else a refusal by him to make a decision.

To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a 'legitimate expectation 'rather than a' reasonable expectation' in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a 'reasonable' man, would not necessarily have such consequences. The recent decision of this House in *Findlay v. Secretary of State for the Home Dept* [1984] All ER 801, [1984] 3 WLR 1159 presents an example of the latter kind of expectation. 'Reasonable' furthermore bears different meaning according to whether the context in which it is being used is that of private law or of public law. To eliminate confusion it is best avoided in the latter.)

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Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the ground on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of proportionality' which is recognised in the administrative law of several of our fellow members of european economic community, but to dispose of the instant case the three already well established heads that I have mentioned will suffice.

By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1947] 2 All ER 680, [1948] KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrive sat it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes) v. Bairstow* [1955] 3 All ER 48, [1956] AC 14 of irrationality as a ground for a court reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head cover also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.

Lord Roskill in the same judgement said:

> In the present appeal your Lordships are not concerned with the first two matters already mentioned with the exercise of a power which does not exist or with wednesbury principles. But this appeal is vitally concerned with the third, the duty to act fairly.
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> The particular manifestation of the duty to act fairly which is presently involved in that part of the recent evolution of our administrative law which may enable an aggrieved party to evoke judicial review if he can show that he had 'reasonable expectation' of some occurrence or action preceding the decision complained of and that that 'reasonable expectation' was not in the event fulfilled.
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> If the executive in pursuance of the statutory power does an act affecting the right of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged on one or more of the three grounds which I have mentioned earlier in this speech.

In this case, the House of Lords held against the plaintiff union only because of national security which overrode any right to judicial review:

> Once the minister produced evidence that her decision not to consult the staff before withdrawing the right to trade union membership was taken for reasons of national security, that overrode any right to judicial review which the appellants had arising out of the denial of their legitimate expectation of consultation. The appeal would therefore be dismissed.

In the plaintiffs case, it was submitted that the discriminating unreasonable action of the defendant against the plaintiff warrants the court's intervention. It would appear that from the facts, there was in fact no policy stating that the ground floor of the market was to be used only for wet goods. In this case the 2nd defendant's conduct shows that it has abandoned its wet market policy if ever there was such a policy. By the 2nd defendant's conduct it is meant that the conduct of its enforcement officers and the 2nd defendants own treatment of the various stall owners on the ground floor. As a matter of fact the court find that there was no such concept known as the wet market policy.

In this case defendants referred to the case of *Pengarah Tanah Dan Galian Wilayah Persekutuan Sri Lembah Enerrise Sdn Bhd* [1979] 1 MLJ 135 at p. 149 where Raja Azlan Shah Ag CJ (Malaya) said (left side A)

> ... it is not the province of the courts to review the decisions of government departments merely on their merits. Government by judges would be regarded as an usurpation.

But we must go on to read what following the above quotation to the end where the learned Chief Justice said:

> Lastly, it is not the province of the courts to review the decision of government departments merely on their merits. Government by judges would be regarded as an usurpation. That clear statement of principle has since been approved and applied by the appellate courts. In *Associated Provincial Picture Houses Ltd v. Wednesbury Corpn.. (ante)*, Lord Greene MR in the course of a judgement since approved by the House of Lords in *Smith v. East Ellow Rural District Council* and in *Fawcett Properties Ltd v. Buckingham County Council (ante)*, in dealing with power of the court to interfere with the decision of a local authority which has acted unreasonably, said (p. 686):
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> > The power of the court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in it.
>
> That is the reason for such cases to be remitted to the relevant authority for a fresh consideration and conclusion according to law. In *Kingston-upon-Thames Royal London Borough Council v. Secretary of State for the Environment* the case was sent back to the secretary of state for reconsideration in *RV Hillingdon London Borough Council (ante)*, the council was required to reconsider the application for planning permission and reach a conclusion on it according to law. In my opinion the appropriate order would be to remit the case to the land executive committee for reconsideration and reach a conclusion on it according to law.

At p. 148 the Chief Justice said:

> Unfettered discretion is a contradiction in terms. My understanding of the authorities in this case, and in particular the case of *Pyx Granite (ante)* and its progeny compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place." (per Danckwerts LJ in *Bradbury v. London Gorough of Enfield*). Sufian LP said at p. 146 (Left hand

I): "It would therefore agree with my brother Raja Azlan Shah CJ that these application should be remitted for reconsideration by the land executive committee in light of the law set out in this judgement."

The defendants submitted that the unauthorised businesses (complained of by the plaintiff) were not the main or core business but only ancillary to the main and legitimate businesses. In other words, the other stall selling newspapers also sold other goods. For this, the defendants referred to exh. 21 (video tape). This is an absurd argument. If the other businesses of the same stall selling newspapers are legitimate, this does not legitimatise the selling of newspapers and the stall would still contravene the wet market concept, if in fact there is such a concept.

The reference to make shift and/or temporary places in which the stalls traded is also absurd. What is shown by P21 is that the stalls were carrying on business. The defendants imply in their submissions that there is no proof that the people shown in P21 were the same people who were the stall holders. It is observed that by adducing P21 as supported by evidence of witnesses in court, the plaintiff has given proof on a balance of probabilities that the 2nd defendant was allowing other stall holders to sell goods not within the wet market concept. The burden of proof then shifts to the defendants to prove that the stall traders shown in P21 were not the stall holders or rightful licence holders. The defendants have not discharged this burden of proof MP Jain in *"Administrative Law of Malaysia & Singapore"* (1980) at p. 300 said:

> Under the heading "Unreasonable" that an unreasonable exercise of discretionary power is bad and referred to the Wednesbury principle". An unreasonable exercise of discretionary power is bad. In this context, the term 'unreasonable' has a very restricted significance. The test for the purpose has been expounded by Lord Greene in associated picture as follows:
>
> > It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it., then the courts can interfere ... but to prove a case of that kind would require something overwhelming...

As explained by Lord Greene, the test of unreasonableness is not what the courts think is reasonable, but 'unreasonable' there is something so absurd that nor reasonable or sensible person could have come to that decision".

The defendants are estopped from denying the plaintiff's right to occupy the said Lot GS39 which was lawfully allocated, to the plaintiff: (See para. 19(2) of the amended statement of claim). By s. 115 Evidence Act it is provided that:

115 Estoppel

When one person has by his declaration, act or omission intentionally cause or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he could have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.

MP Jain at p. 209, of his above mentioned book stated:

Besides s. 115, Evidence Act, the courts also invoke at times against administrative authorities the doctrine of equitable estoppel. The reason for doing so is that in certain situations the courts want to protect innocent and unsuspecting persons from being injured by acting on the representations made by government officials. This doctrine creates substantive rights in favour of the person to whom a representation has been made by the authority concerned. This concept based on equitable principles is more flexible than s. 115; and a case which may not fall within the preview of s. 115 may yet be covered by the equitable doctrine. Whereas s. 115 relates to some facts which were alleged to be actually in existence at the time the representation was made and the authority making representation is then estopped from denying those facts in a suit or proceeding, the equitable doctrine covers promises by the authority, or representations containing statements, as to the course of conduct the authority proposes to follow in future. An element common to both. Section 115 and the equitable estoppel, is that none operates against a statute; the authority making the representation will not be forced to infringe a statute.

In reply to the reference made by the defendants the plaintiff pointed out that the case of *Public Textiles v. Lembaga Letrik Negara* was decided that way because to invoke estoppel would have made the local authority do something *ultra vires*, ie, charge less than the scheduled rates. But in *Tenaga Nasional v. Perwaja Steel* where estoppel was applied against Tenaga Nasional. It therefore depends on the facts of any one case under administrative law whether estoppel applies. It is therefore submitted that there is nothing to prevent estoppel being applied against the defendants in this case.

In para. 7 of the defence dated 26 July 1993, the defendants said that "During the time the plaintiff was at Lot GS39, the plaintiff was only a penjaja 'bare licensee'. But it is observed that the defendant has referred to her as a "penyewa" and that the defendant is estopped from denying that the plaintiff has a lawful right to occupy the said Lot GS39. See exh. D20, para. (12) on p. 8 which says: "Jawatankuasa Perlesenan telah membuat keputusan supaya Puan Lee Hay yang masa ini menyewa GS39 berpindah ke GBR38".

The definition of "tenant" (penyewa) in *"Land Law in Malaysia"* by Teo & Khaw (1987) p. 175 it is stated that:

> There are three essential characteristics of a lease or a tenancy. First, the lessee or tenant is given the right to exclusive possession of the demised premises, that is. he has the right to exclude all persons, including the lessor or landlord from the demised premises.

The defendants in this case have called the plaintiff a "tenant" in exh. D20 so it would appear that according to the defendants, the plaintiff has exclusive possession.

The definition of "bare licence" in *"The Law of Real Property"* by RE Megarry (3nd edn) pp. 776 -77 is stated that this is a licence granted otherwise then for valuable consideration such as a gratuitous permission to enter a house or a field. But exh. D20 says that the plaintiff has rented ("menyewa") GS39, it was obvious that the defendants were admitting that the plaintiff had given valuable consideration and this contradicted their allegation that the plaintiff only had a bare licence. The 2nd defendant took irrelevant considerations into account when it made the decision to require the plaintiff to move from the said Lot GS39: (See para. 19(3) of the amended statement of claim). It is submitted that the reason the plaintiff was asked to move from Lot GS39 was because the goods she was selling were not wet goods. See for eg, evidence of SP4 (Ang Boo Soh) a councillor. On 10 October 1995, he said that the reason was that GS39 was meant for green, fresh vegetables. This was also confirmed by SP3 (Shoib bin Hj. Md. Silin) a councillor who gave evidence on 29 October 1997. This reason was also stated in paras. 11 and 13 of the defence dated 26 July 1993. This reason was an irrelevant consideration because the evidence showed that in fact other stalls on the ground floor were selling dry goods such as newspapers. Another stall-owner (SP7) Abdul Lajis @ Abd. Aziz bin Lani gave evidence on 25 September 1996 that he had been a trader at the market from 1980 and that since 4 years ago, he moved to the new market. His licence from 1984 - 1991 is shown in exh. P4. He said that lots of stalls were not selling goods which they were supposed to under their licence for example there was another stall on the ground floor selling newspaper apart from the plaintiffs stall but no action was taken against that stall-owner. That stall on the ground floor is still selling newspapers today. This stall also sold eggs and joss-sticks in addition to newspapers. He said the stall on the ground floor selling roti had been selling roti for a long time but no action was taken against him. SP7 also confirmed that the plaintiff was not the only one occupying a stall without licence in the new market. He said everyone else was waiting for a licence. But no one else was given notice to quit apart from the plaintiff. In fact the defendants have given no proof or evidence that other stalls were subjected to the same action that plaintiff was

subjected to. The only actions taken was mentioned by the enforcement officers SDI and SD2 in their evidence on 25 September 1996 were action against illegal stall-owner trading on the roadside in front of the market and against stall-owners who had gone outside the boundary of their stalls. Under cross-examination, SD1 admitted that he was not an enforcement officer under the licensing committee. Therefore his evidence bears no weight. SD2 says he started duty at the new market only in 1993 and was there until 1995. Under cross-examination, he admitted he had no knowledge of matters before 1993. He confirmed what SP7 had said, that there was another stall apart from the plaintiffs stall, in the new market selling newspapers. He said this stall should sell only eggs and he did not know why he was allowed sell newspapers. He also confirmed that he did not remember any report being made about this. SD2 confirmed what SP7 said, that the public toilet on the ground floor was being used as a store for goods. He said he told his office about this and that it should not be used to store goods but he did not receive any instruction to take action.

The point here is that the reason given by the defendants for taking action against the plaintiff was an irrelevant consideration and that the court hereby makes a finding of fact there was no policy stating the ground floor of the market was to be used only for wet goods. Wade & Bradley on *"Constitutional and Administrative Law"* 10th edn, at p. 632 states that powers vested in a public authority must be exercised in accordance with the intention of Parliament as may be inferred from the Act in question. In a 19th century case, local justices were held not to have exercised their discretion lawfully when they refused to order a parish to meet certain poor law expenses on the ground that the operation of the Act of Parliament was unjust. In 1972, the Birmingham licensing planning committee was held to have taken extraneous considerations into account when it required a hotel company to make payment to brewery companies as a condition of the company receiving a licence for a new hotel.

MP Jain at p. 289 of his book said:

> That many a time the statutes confer power but do not mention the considerations for its exercise. Even in such a case, the authority can take into account only such considerations as may be relevant to the purpose for which the power has been conferred. If the authority takes into account certain circumstances or considerations which are irrelevant or extraneous to the purpose or the tenor of the statute in question, then its act will be invalid even if the authority in question has acted in good faith. A converse proposition is also applicable, *viz*, if the authority concerned does not take into account, or ignores, considerations which are relevant to the purpose of the statute in question, then again its act will be invalid. It is the function of the courts to assess whether the authority has taken into account any irrelevant

considerations, or ignored any relevant considerations, in making an order in the exercise of its discretion. Interpretation of statute is a judicial function. Therefore, the courts can see whether administrative power conferred by an Act has been exercised for relevant or irrelevant reasons. This gives scope for judicial creativity and gives an additional dimension to judicial review. A very broad discretionary power can thus be controlled to some extent by the courts.

If the statute itself spells out the relevant criteria which have to be taken into consideration in exercising the given power, then the task of the courts is relatively easy, for, in such a case, they have only to assess whether relevant considerations have been applied and irrelevant consideration not taken into account. But, usually, the statues do not do so. A statute may confer power almost in unlimited terms without spelling out the relevant criteria for its exercise. In such a case, the courts may, by looking into the purpose, tenor and provisions of the statute, assess whether relevant or irrelevant consideration have been applied by the authority in taking the decision in question. As the House of Lords had emphasised in padfield, the legislature confers discretion on an authority with the intention that it should be use to promote the policy and the objective of the Act, and the same must be determined by construing the Act as a whole. The court can quash an exercise of power if, in its opinion, it has been exercise for reasons which are not good, or are bad reasons.

It may however be difficult to establish this ground in the absence of reasons being given by the authority in support of its decision, and such an obligation arises only when the relevant statue requires it. There is no obligation on an authority to reason out is actin or decision in the absence of a statutory obligation on it for the purpose. The courts will interfere where, due to misunderstanding of the law or some other reason, the mind of the authority was not been applied at all to what was legally imperative for it to consider.

In this case although s. 107 of the Local Government Act gave the 2nd defendant power to grant and revoke licences without assigning reasons for its decisions, the 2nd defendant had made known to the plaintiff its reason for its decision against the plaintiff and these reasons took into account irrelevant considerations, ie, that the plaintiffs business sold dry goods in a market where apparently lots of other stalls also sold dry goods on the ground floor without punitive action being taken against them.

In the case of *Pushpadevi Singam v. UM* [1993] 4 CLJ 602; [1993] 2 AMR 41: p. 3025 the plaintiff was medically boarded out on medical grounds. The medical board changed its earlier decision that the plaintiff was physically fit to work and subsequently found that based on the number of days of medical leave which the plaintiff had taken she was not well enough to carry on working. Held: The plaintiffs termination of service was wrong as the medical board had arrived at a decision no reasonable tribunal could have reached as it has taken into consideration matters which it had no right to consider, namely medical leave taken by the plaintiff and her operation in 1971. At p. 3042 para. 20-25 of the report the court said:

> Finally there is in the circumstances of this case entirely no justification for the Medical Board to hold a view favourable to the Plaintiff at their first meeting and yet at the second meeting they chose to reverse their earlier view and reached an entirely different conclusion when the documentary evidence tendered at both meeting were the same.

At pp. 3040 - 3041 the court said:

> The courts have, however, always been careful to distinguish their intervention whether on excess of jurisdiction or error of law from an appellate function. Their jurisdiction over inferior tribunals is supervision not review." It is to be noted in using the words "not review" Lord Pearce was in fact stating that the court should not usurp the power of the tribunal conferred by law to enquire into the certain matters by taking upon itself to hold an enquiry in order to dissolve the matters when the law did not empower it to hold such an enquiry. Unless that restriction on the refraining of holding an enquiry by the court is observed, the court will, under the guise of preventing the abuse of power be itself usurping the power. Reverting to the speech of Lord Pearce in the *Anisminic* case His Lordship went to quote the following passage from the judgement made in the case of *Rex v. Nat Bell Liquors Ltd* [1922] 2 AC 128 @ 156:
>
> > That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise.

Applying the above legal principle to the present case I am satisfied that the medical board had committed an error of law in that it had arrived at a decision which no reasonable tribunal could have reached The change in decision was caused by an irrelevant consideration (plaintiff selling dry good in a floor allegedly meant for wet goods) the change was therefore made without good, reasonable and valid reasons. In his book *"Judicial Review: Law & Procedure"* [1985] RJF Gordon said at p. 138,

> Bad Faith:
>
> It is undeniably an abuse of discretion for a local authority to act in bad faith. Care should be taken however to ensure that an application for judicial review only alleges bad faith where it is contended that there has been some dishonest misuse of power ...

This dishonest misuse of power on the part of the 2nd defendant was shown in the 2nd defendant's conduct in making a change of decision on 26 November 1992 (exh. D20) and filing a defence dated 26 July 1993, para. 17 denying the existence of its meeting of 27 April 1992 and filing an affidavit in court (encl. 33 dated 19 September 1993 affirmed by Abdullah bin Hj. Rahman, council secretary of the 2nd defendant) saying at para. 10(b) that there was no record of such a meeting and further stating that under

s. 27 of the Local Government Act 1976 the 2nd defendant was not obliged to produce minutes of the meetings. However, when the plaintiff managed to produce a copy of the minutes of the meeting dated 27 April 1992, the 2nd defendant and its witnesses could not deny that such a meeting took place. The motive for such denial was to show that the deceased DO's decision to give Lot GS39 to the plaintiff was never ratified by a full council meeting of the 2nd defendant. SP2 when recalled on 8 August 1996 said in examination-in-chief that the 2nd defendant's people had asked her for money to settle the matter but she refused to pay.

In this case it is in evidence that when the DO Haji Ali Shafie recommended that Lot GS39 be given to the plaintiff, the council agreed and when it was recommended by the licensing committee that she be asked to move from Lot GS39, the council also agreed.

MP Jain said at p. 284 of his book that:

> At times, the term *mala fides* may be used in a sense wider than corrupt motive. In his sense, *mala fides* may denote all those grounds which indicate abuse of power e.g. irrelevant considerations, improper purpose, etc. In this sense, *mala fides* become a synonym for abuse of power.

In Wade & Bradley's book on *"Constitutional & Administrative Law"* at p. 633 it is stated:

> The exercise of a power for an improper purpose is invalid. Improper purposes include, but are not restricted to malice or personal dishonesty on the part of the officials or councillors making the decision; examples of this kind are rare. Most instances of improper purpose have arisen out of a mistaken interpretation by a public authority of what is empowered to do so, sometimes contributed to by an excess of zeal in the public interest. Thus a city council which was empowered to buy land compulsorily for the purpose of extending streets or improving the city could not validly buy land for the purpose of taking advantage of an anticipated increase in value of the land. In *Congreve v. Home Office*, where the Home Office had threatened certain holders of television licences would be revoked by the Home Secretary if they did not each pay an extra £6 (six pound), the Court of Appeal held that it was an improper exercise of the Home Secretary's discretionary power of revocation "to use a threat to exercise that power as a means of extracting money which Parliament has given the Executive no mandate to demand.

In Municipal Council of Sydney v. Campbell [1925] AC 338 the local authority was found to have exercise its powers for a purpose differing from those specified by the statute and it was therefore rightly restrained.

In the instant case the 2nd defendant had exercised its statutory powers for an improper purpose *ie*, victimisation or discrimination against the plaintiff and it should therefore be restrained from doing so.

The 2nd defendant had exercised its discretionary powers under an error of law in that there was no evidence to support its action and/or it came to a conclusion to which, on the evidence, it could not reasonably have come: See para. 19(5) of the amended statement of claim.

What is meant by "error of law" for which the court should intervene to correct? At p. 633-634 of their book Wade & Bradley state, referring to the case of *Ashbridge Investment v. Minister of Housing* [1965] 3 All ER 371:

> The notion of error of law goes much wider than a mere mistake of statutory interpretation. A minister commits an error of law if *inter alia* he acts when there is no evidence to support his action or if he comes to a conclusion to which, on the evidence, he could not reasonably have come... .

In the *Ashbridge Investments Ltd v. Minister of Housing* [1965] 3 All ER 371 the question whether a house was unfit for human habitation' was decided by the Minister of Housing base on his inspector's report. Held: It was for the Minister to decide and he had decided relying on a report which showed the primary facts relevant to the question.

At p. 373 of the case the court said:

> It is simply a case for the court to ask: Did the Minister have reasonable grounds or no for determining No. 17 to be a house? The Minister concedes that, if he had no evidence before him such as to justify that findings, or if the materials before him were such that he could not reasonably come to the conclusion that it was a house, then, of course, the court could interfere. The Minister also concedes that, if he has erred in point of law, the court can inquire into and quash his decision ...

In the instant case there is no evidence to justify the 2nd defendant's decision requiring the plaintiff to move from Lot GS39 to Lot GBR 38 and the therefore the court should interfere to restore the plaintiff to Lot GS39.

Wade & Bradley also referred to the case of *Coleen Properties v. Minister of Housing* [1971] 1 All ER 1049 at their footnote (29) at p. 634 of their book. In the *Coleen Properties* case the local council decided to acquire Clark House compulsorily on the ground that this was reasonably necessary for the satisfactory development or use of the clearance are for housing purposes under s. 43(2) of the Housing purposes under s. 43(2) of the Housing Act 1957. After the local inquiry, the inspector recommended to the Minister that the acquisition of Clark House was not reasonably necessary for the satisfactory development of the clearance area. The Minister rejected the recommendation. Held: There was no material on which the Minister could properly over-rule

the inspector's recommendation and accordingly his decision was wrong and the compulsory purchase order so far as it related Clark House would be quashed. Buckely LJ at p. 1056, para (h-j) of the report said the Minister's decision was ultra vires the law.

> The Minister has not expressed any particular reasons for his opinion; and, for the reasons which my Lords and I have indicated, I think that he had no sufficient material before him on which to arrive at the view on which he purported to base his decision - a decision which was in conflict with the view of the inspector who was actually better able to form an opinion because he had the evidence of his own eyes to rely on, which was not evidence of a kind available to the Minister. As I think that the Minister had no sufficient material on which to reach the decision which he did reach, it follows that he acted ultra vires the section and that his decision is one which should not be permitted to stand.

Similarly, in this case the court finds that there was no material on which the 2nd defendant could properly reverse its previous decision regarding the plaintiff's allocation of Lot GS39 and its decision of 26 November 1992 was therefore wrong and should be reversed.

In the case of *Penang Development Corpn v. Teoh Eng Huat* [1993] 2 CLJ 283 the Penang Development Corporation ("PDC') a statutory body engaged in housing development was sued by a purchaser of a house for liquidated damages for delay in completion of the house. The PDC filed a defence stating, *inter alia*, that it was exempt from the provisions of the Housing Developers (Control & Licensing) Act 1966 and that the value giving the plaintiff liquidated damages was *ultra vires* because inserted without the authority of the defendants and was contrary' to s. 2(1)(b) of the Housing Developers Act. Held: The clauses giving liquidated damages to the plaintiff were valid and not *ultra vires* or illegal. At p. 66 the court said:

> To start with the term *ultra vires* is apt to suggest the paradigm of a public authority stepping outside a clearly defined sphere of competence as is illustrated in the case of: *Attorney General v. Great Eastern Railway and Ashbury Railway Carriage & Iron Co. v. Riche (supra)* and like cases cited in the judgment of the learned judge. On the other hand, official action, while being of a kind for which the authority is empowered, may be in some way erroneous and subject to reversal or modification by a higher authority on appeal or by other process of judicial review. A clear distinction has to be made on the character and effect of the official action for the purpose of a defence. *Ultra vires* as used in the case quoted above is now referred to as the narrow or contemporary notion of *ultra vires*. However, since the case of *Anisminic Ltd. v. Foreign Compensation Commission & Anor (supra)* it has become increasingly clear from the authorities that the contemporary notion of *ultra vires* is by no means confined to a situation where a public authority steps outside the boundaries of the field of activity allocated to it by the law.

The notion of ultra vires now encompasses a situation where the public authority commits an error of law albeit that the authorities action is undeniably of a kind falling within the field of activity allocated to it by the law. See *Wade on Administrative Law*, 6th edn, p. 43. At p. 44 Professor Wade commented:

> In general, however, the courts adhere firmly to the wide meaning of jurisdiction', since this is the sheet-anchor of their power to correct abuses. They appear to be willing to stretch the doctrine of *ultra vires* cover virtually all situations where statutory power is exercised contrary to some legal principle ...

The development of the doctrine of *ultra vires* since has led some writers to classify the new concept of *ultra vires* as *ultra vires* in the broad sense. Thus, where official action while being within the scope of the authority of the law or a corporation if it becomes erroneous on some grounds such action would now be described as *ultra vires*, being outside jurisdiction, under the broad concept of *ultra vires*. Examples of *ultra vires* used in this sense and the grounds therefore are succinctly illustrated by Lord Pearce in the *Anisminic* case at p. 195, Lord Reid in the same case at p. 171 and Lord Greene in *Associated Provinical Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223. For the sake of convenience, the remarks of Lord Reid at p. 171 of the *Anisminic* case is reproduced:

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it an decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which under the provision setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly...

Although Lord Reid was talking about tribunal the same principle would apply in the case of an officer exercising his discretion or authority under the provisions of a statute.

Thus the *ultra vires* principle can still apply even though a local authority acts within the scope of the law if its decision was made in bad faith or it took into account irrelevant considerations. The 2nd defendant acted *ultra vires* its powers under the local government when it made its decision against the plaintiff because it took into account irrelevant consideration and acted in bad faith.

The 2nd defendant having made a decision in full council meeting (see P5(8) on allowing the plaintiff to change from the said Lot GBR38 to the said Lot GS39 could not alter its decision to the plaintiffs disadvantage except for good and valid reasons. (See para. 19(6) of the amended statement of claim.)

The evidence shows that the 2nd defendant did alter its decision on 26 November 1992 (see D20) without good and valid reason.

At p. 651-652 of their book, Wade & Bradley stated under the heading "Binding nature of official acts:

> in his dealing with government, the citizen often needs to know if he can rely on a statement made to him by an official or on an administrative decision which has been notified to him. In business and commercial affairs, an individual is entitled to hold another to his word when a contract has been concluded between them. But official decisions like the issue of a licence, the granting of planning permission or the payment of a subsidy, usually do not take a contractual form. When is a citizen entitled to hold a public authority to its word, or the word of one of its officials? Is an authority free to change its mind, or to disavow an official whose conduct has led the citizen to believe that the authority has made a certain decision? May a senior civil servant in Whitehall overrule what has been done by a regional office of the ministry?

First, if an official agency take a decision affecting the rights of the subject and then communicates it to the citizen, without qualifying it by words such as 'provisional' or 'subject to review', the agency has exercised its discretion in the matter and may not thereafter alter the decision to the subject's disadvantage (quoting the case of *Re 56 Denton Road Twickenham* [1953] Ch Slits footnote (3)).

In the case of *56 Denton Road* the War Damage Commission was empowered by Parliament to determine what damage was a total loss and what damage was not a total loss in relation to properties damaged during the War. In respect of 56 Denton Road, the Commission informed the owner that the preliminary classification for purposes of compensation was that the damage was not a total

loss classification. The payment to be made when it was not a total loss was much higher than that for a total loss. Held: The earlier classification was binding on the commission. Similarly, the 2nd defendant, having made a decision on 27 April 1992 and communicated it to the plaintiff is bound by its earlier decision as it cannot show a good and valid reason for changing the earlier decision.

The same point was made in the case of *Pushyadevi Singam v. University of Malay* [1993] 4 CLJ 602; [1993] 2 AMR 41:3025 at p. 3042, para. 20 - 25 where it is said:

> Finally there is in the circumstances of this case entirely no justification for the Medical Board to hold a view favourable to the plaintiff at their first meeting and yet at the second meeting they chose to reverse their earlier view and reached an entirely different conclusion when the documentary evidence tendered at both meetings were the same.

The 2nd defendant has contravened art. 8 of the Federal Constitution in that it purported to exercise its discretion under the "Undang-Undang Kecil Penjaja (Kawasan Majlis Daerah Hulu Langat) 1983" in a discriminatory manner so as to deprive the plaintiff of her right of equal protection under the law (See para. 19(7) of the amended statement of claim.)

It has been stated that art. 8 guarantees that a person in one class should be treated the same as another person in the same class: See the judgement of Suffian LP in *Public Prosecutor v. Khong Teng Ken* [1976] 2 MLJ 166, 170. This is quoted in *"The Constitution of Malaysia"* by Sheridan & Groves [1979] at p. 61 of the book where it is stated:

> Clause (1) does not proclaim that all persons must be treated alike, but that persons in like circumstances must be treated alike. Rational classification is permitted,. What constitutes a circumstance entitling the legislature to differentiate between persons or classes of person and what constitutes unconstitutional discrimination are questions of political values, to be decided by the court. These values may vary from place to place and the application in Malaysia of American and Indian principles does not necessarily means reproduction in Malaysia of American or Indian determinations of particular disputes. That there may even be variation from time to time in the same place is illustrated by *Plessy v. Ferguson* [1896] 163 US 537 and *Brown v. Board of Education of Topeka* [1954] 347 US 483.

In *Public Prosecutor v. Khong Teng Khen* [1976] 2 MLJ 166, 170 Suffian LP said for the Federal Court:

> The principle underlying Article 8 is that a law must operate alike on all person under like circumstances not simply that it must operate alike on all persons in any circumstance, nor that it must be general in character and universal in application and that the State is no longer to have the power of distinguishing

> and classifying persons... for the purpose of legislation' ...the law may classify person... the law may classify offences into different categories fiscal law may divide a town into different areas.... All that Article 8 guarantees is that a person in one class should be treated the same as another person in the same class...

In *Datuk Haji Harun bin Haji Idris v. Public Prosecutor* [1977] 2 MLJ 155, 165 Suffian LP set out some of the principles of equality applicable in Malaysia:

> 1. The equality provision is not absolute. It does not mean that all laws must apply uniformly to all person in all circumstances everywhere. 2. The equality provision is qualified. Specifically, discrimination is permitted within cl. (5) of art. 8 and within art. 153. 3. The prohibition of unequal treatment applies not only to the legislature but also to the executive - this is seen from the use of the word 'public authority' in cl. (4) and 'practice' in cl. (5)(b) of art. 8.4. The prohibition applies to both substantive and procedural law. 5. Article 8 itself envisages that there may be lawful discrimination based on classification - thus Muslim as opposed to non-Muslim (para (b) of cl. (5) of art. 8); aborigines as opposed to others (para (c); residents in a particular State as opposed to residents elsewhere (para (d); and Malays and native of Borneo as opposed to others who are not (art. 153.)

It is obvious from the evidence of SP2 on 10 October 1995 and 8 August 1996, SP7 on 25 September 1996, SP3 on 8 August 1996 and SD2 on 25 September 1996 that although there were other stall owners on the ground floor selling dry goods and selling goods which they were not supposed to under the terms of their licences, no action had been taken by the 2nd defendant against them. The only action taken was against the plaintiff. She had therefore been given unequal treatment under the law.

In *Ahmad Tajudin bin Hj Ishak v. Suruhanjaya Pelabuhan Pulau Pinang* [1997] 2 CLJ 225; [1997] 1 AMR 273 it was said:

> Article 8(1) of the Federal Constitution states that all persons are equal before the law and entitled to the equal protection of law. Learned counsel for the appellant maintains that his client had a legitimate expectation that they would be given the powers of auxiliary police sergeants and would be paid the same allowances as their 46 colleagues. He had cited Basu's Commentary of the Constitution of India Volume B on Article 14 at p 142 which states that even where a person claiming some benefit or privilege has no legal right to it in private law, he may have a legitimate expectation of receiving the benefit or privilege as a matter of public law in which case the courts will insist on a fair procedure. Of course, in order to constitute such legitimate expectation, it must have a reasonable basis, for example, a statement of undertaking or any act on the part of the public authority which would make it unfair or inconsistent with good administration to deny such opportunity or the existence of a regular practice which the claimant can reasonably expect to continue.

He had argued that the relevant Article is an injunction to both the legislative and executive organs of the State and other subordinate authorities not to deny to any person equality before the law or the equal protection of the law. Article 8(2) of the Federal Constitution also provides that there shall be no discrimination against citizens in the appointment to any office or employment under a public authority which according to learned counsel would encompass all stages of service from initial appointment to termination including promotion fixation of seniority, termination, gratuity and the like.

...

...

It has been decided in *PP v. Khong Teng Khen & Anor* [1976] 2 MLJ 166 that the principle underlying art. 8 of the Federal Constitution is that the law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstances nor that it must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons for the purpose of legislation. It was also held that all that Article 8 guarantees is that a person in one class should be treated the same as another person in the same class.

In the court below, counsel for both sides stood on common ground upon the issue of discrimination. They were agreed that it was within the right of the respondent as an employer to discriminate among his employees. They were also agreed that, in the absence of an Act of Parliament in that behalf, unfair discrimination whether on the basis of sex or other criteria was not actionable. The trial judge held the same view. Indeed, he said so in no uncertain terms in his judgment.

...

...

Counsel and the judge were quite wrong, of course. They all overlooked the far-reaching provision of arts. 5(1) and 8(1) of the Federal Constitution. The combined effect of these two articles is to strike down any arbitrary or harsh and unfair action which adversely affects the quality of life. See *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 AMR 22:1617; [1996] 1 MLJ 261 and *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan and another appeal* [1996] 3 AMR 42:3181; [1996] 1 MLJ 481. It follows that where person s livelihood or reputation is adversely affected by a decision, then the decision maker must act fairly and reasonably.

In *Ahmad Tajudin'* case, the appellant and 53 others holding similar rank to him sued the Suruhanjaya Pelabuhan Pulau Pinang for acting indiscriminately towards him and the 53 others as regards the salary sale applicable to them. Held: On the facts of the case, there was no discrimination.

In this case, the plaintiff, having been given Lot GS39 by the late Haji Ali Bin Shafie (the district officer) which decision was subsequently ratified by the 2nd defendant in full council meeting had a legitimate expectation in view of the existing practice that the decision of the 2nd defendant would not be reversed without good reason. That the reversal was unusual is confirmed by the evidence of SP3, a councillor and also a member of the licensing committee, under examination-in-chief when recalled on 25 September 1996.

The *Ahmad Tajudin* case went on to state:

> As for the legitimate expectation point, it is appropriate at this point to reproduce the speech of Simon Brown LJ in *R v. Devon CC ex p Bakar* [1995] 1 All ER 73 where at pp. 88 and 89 he had said:
>
> > It is first, I think, convenient to identify, at least in broad categories, various of the distinct senses in which the phrase 'legitimate expectation' is nowadays use.
> >
> > (1) Sometimes the phrase is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him. It was used in this sense and the assertion upheld in cases such as *R v. Secretary of State for the Home for the Home Dept. ex p Ruddock* [1987] 2 All ER 518, 518 [1987] 1 WLR 1482. It was used in the same sense but unsuccessfully in, for instance, *R v. Board of Inland Revenue, ex p. MFK Underwriting Agencies Ltd* [1 All ER 91 [1990] 1 WLR 1545 and *R v. Jockey Club ex p RAM Racecourses Ltd* [1990] [1993] 2 All ER 225. The various authorities show that the claimant's right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertakings to how its power would be exercised inconsistent with the statutory duties impose upon it. The doctrine employed in this sense is akin to an estoppel. In so far as the public body's representation is communicated by way of a stated policy, this type of legitimate expectation falls into two distinct sub-categories: cases in which the authority are held entitled to change their policy even so as to affect the claimant, and those in which they are not. An illustration of the former is *R v. Torbay BC, ex p Cleasby* [1991] COD 142, of the latter, Ex p Rhan.
> >
> > (2) Perhaps conventionally the concept of legitimate expectation is use to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or, some would argue, attain). Here, therefore, it is the interest itself rather than the benefit that is the substance of the expectation. In other words the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements

of procedural fairness: the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision. Of the various authorities drawn to our attention, *Schmidt v. Secretary of State for Home Affairs* [1969] 1 All ER 904 [1996] 2 CH 149, *O'Relly v. Mackman* [1982] 3 All ER 1124 [1983] 2 AC 237 and the recent decision of Roch J in *R v. Rochadale Metropolitian BC, ex p Schemet* [1992] FCR 306 are clear examples of this head of legitimate expectation.

(3) Frequently, however, the concept of legitimate expectation is used to refer to the fair procedure itself. In other words it is contended that the claimant has a legitimate expectation that the public body will act fairly towards him. As was pointed out by Dawson J in A-G for new S*outh Wales v. Quin* [1990] 93 ALR 1, 39 this use of the terms is superfluous and unhelpful: it confuses the interest which is the basis of the requirement of procedural fairness with the requirement itself:

> No doubt people expect fairness in their dealings with those who made decisions affecting their interests, but it is to my mind quite artificial to say that this is the reason why, if the expectation is legitimate in the sense of well founded, the law imposes a duty to observe procedural fairness. Such a duty arises. if at all, because the circumstances call for a fair procedure and it adds nothing to say that they also are such as to lead to a legitimate expectation that a fair procedure will be adopted.

(4) The final category of legitimate expectation encompasses those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice. Fairness requires that the public authority be held to it. The authority is bound by its assurance, whether expressly given by way of a promise or implied by way of established practice. *Re Liverpool Taxi Owners' Association* [1972] 2 All ER 589, [1972] 2 QB 299 and *A-G of Hong Kong v. Ng Yuen Shiu* [1983] 2 ALL ER 346, [1983] 2 AC 629 are illustrations of the court giving effect to legitimate expectations based upon express promises; Council of Civil *Service Unions v. Minister* for the Civil Service an illustration of a legitimate expectation founded upon practice albeit one denied on the facts by virtue of the national security implications. Let me acknowledge at once that the above is by no means an exhaustive analysis of the concept of legitimate expectation; anyone interested in that should study instead Mr Paul Craig's illuminating article 'Legitimate expectations; a conceptual analysis' (1992) 108 LQR 79, rather it is an attempt at a broad categorisation which may, I hope, clear away some at least of the many semantic confusions that have bedevilled this are of our law.

In order for unfair discrimination to be actionable the following elements must be proved to exist:

a) there must be some form of discrimination,

b) the discrimination must be unfair;

c) there must be resultant harm or injury.

In the plaintiffs case before the court all the above said elements are present.

It must be remembered that whether a committee or a local authority acts in an adjudicatory capacity or not is not the decisive factor. The principle of the administrative law cases quoted in this case refer to the court's power to have a judicial review of the decision-making process of the local authority (2nd defendant). The decision-making process may be done in an adjudicatory or administrative capacity. If done in an adjudicatory capacity, it has to give reasons. If done in an administrative capacity, it need not give reasons. In our case, the 2nd defendant's decision was an administrative one and the 2nd defendant need not give reasons (see s. 107 of the Local Government Act). However, the 2nd defendant had given a reason and the reason given was so unreasonable that it showed the decision was wrongly made. In such circumstances, the court can have a judicial review and can ask the 2nd defendant to reconsider the decision to move the plaintiff from Lot GS39, in effect to ask the 2nd defendant to reinstate Hj. Ali's allocation of Lot GS 39 to the plaintiff

In *Pushpadevi Singam v. University of Malaya* [1993] 2 AMR (4) 3025 refers to *Halsbury Laws of England*, 4th edn, vol. (1) which states that:

> Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself It is thus different from an ordinary appeal. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected: it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority...

Hence the court's duty is to consider whether the decision-making process has been fair in the plaintiffs case, not for example whether the 2nd defendant is entitled to have a wet market policy or not. As to the public interest element to be the foremost consideration as opposed to the plaintiffs individual right it is very dangerous for words such as the "public interest" to be peppered here and there to cloud the issue. What is the real public interest in our case? It is submitted that it is not allowing a local authority to hide behind s. 107 of the Local Government Act in circumstances applicable to the plaintiffs case.

The defendants denied the existence of a meeting of 27 April 1992. (See pp. 28-29 of the plaintiffs submission dated 1 December 1997 and encl. 33, para. 10(b) (Abdullah bin Hj. Rahman's affidavit dated 19 September 1993) and exh. P19 at p. 60 of ikatan B (SY Chew & Co's letter dated 8 December 1994 to the defendants' solicitors Yazid Baba & Co referring to a meeting of 5 October 1994). After the said letter was sent, there was a letter dated 15 December 1994 from the defendants' solicitors which appeared to ask for copies of the minutes of the meeting of 27 April 1992. This 15 December 1994 letter was not adduced but P15 (p. 41 of ikatan B) was the plaintiffs solicitors' letter of 20 December 1994 and referred to the said letter of 15 December 1994 and said:

> As requested, we forward herewith a photocopy of the Minutes Bil. 4/92 of a meeting of the full council of the 2nd defendant which was posted to us anonymously (P5).

There is no letter in evidence to show the defendant denied their representatives at the meeting of 5 October 1994 had denied having a meeting of 27 April 1992. Neither did the defendants call any of their representatives (who attended the meeting of 5 October 1994) to give evidence to deny the accuracy of P19. On the denial that the plaintiff was victimised because the 2nd defendant's people had asked her for money to settle the matter but she had refused to pay, it was submitted that the defendants must accept the evidence of SP2 on this issue as none of their witnesses in court denied this and the defence counsel had not bothered to cross-examine SP2 on this matter. This failure to cross-examine should be weighed against the defendants. (See case of *Teo Hock Guan v. Johore Builders* [1996] 4 CLJ 184; [1996] 2 AMR 2330 which states that failure by the defence to cross-examine the plaintiffs witness on a point of critical importance (ie, that delay in building works had been caused by extra work) would have an adverse effect upon the defendant's case. Similarly in the case of of *PP v. Manso*r [1997] 1 CLJ 233; [1996] 3 AMR 3989 the Federal Court said the failure of the defence to cross-examine PW1 and PW13 as to the safe keeping of the cannabis or the suggestion of meddling by other chemists (a question of break in the chain of evidence) meant that based on the evidence of PW1 and PW13. there was no doubt that there was no break in the chain (See p. 3991, lines 24-32 of the report).

In the case of *Yeap Seok Pen* referred to by the defendants' the court held bad faith had not been proved because the appellant alleged bad faith based on bias against non-Malays on the part of various government officials involved in the land acquisition. At p. 63, left hand column, para. H, the court said:

> The appellant produced no direct evidence of bias against non-Malays on the part of the various Government officials involved in the transaction.

In the instant case the plaintiff had given direct evidence of bad faith as shown in the minutes of the 2nd defendant's meeting (P5) and 2nd defendant's affidavits (encl. 33 and Abdullah Hj Rahman's affidavit dated 31 December 1993) and their defence dated 26 July 1993 which seemed to contradict the defendants' evidence regarding the meeting of 27 April 1992, and P15, P19, P21 as well as the defendants' exh. D20. All the said documentary evidence when viewed together with the oral evidence indicated sufficient proof of bad faith on a balance of probabilities. The reasons given by the defendants for their decision against the plaintiff showed a dishonest misuse of powers especially as they first denied the existence of the meeting of 27 April 1992 in their defence and in encl. 33 (affidavit of Abdullah Hj. Rahman dated 19 September 1993) at para 10(b).)

As regards *Tan Boon Liat's* case referred to by the defendant's, it is noted that it said a want of *bona fides* may be made out by proof of ulterior purposes. But it is noted that it is not a must and it is submitted that the plaintiff may show other circumstances to prove bad faith. Further, the presumption of good faith in favour of the administration that MP Jain talked about in his book had been refuted in this against the 2nd defendant.

In the circumstances proved by the plaintiff the court allows the plaintiffs claim in terms of (b)(c) and (e) as prayed for in her amended statement of claim dated 26 May 1993.